IP 00-0786-C T/K Lockman-Gelston v Var. Annuity
Judge John D. Tinder Signed on 3/29/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LOCKMAN-GELSTON, CAROL J,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
VARIABLE ANNUITY LIFE INSURANCE COMPANY,	)	CAUSE NO. IP00-0786-C-T/G
AMERICAN GENERAL CORPORATION,	)	
	)	
Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAROL J. LOCKMAN-GELSTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 00-0786-C-T/K
	)	
VARIABLE ANNUITY LIFE INSURANCE COMPANY and AMERICAN GENERAL CORPORATION,	)	
	)	
Defendants.	)	

Entry on Summary Judgment and Related Motions[1]

Plaintiff alleged claims for age and disability discrimination in employment in violation of the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"). Defendants moved for summary judgment. That motion led to two motions to strike. The court rules as follows.

I. Summary Judgment Standard

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether there is a genuine issue of material fact, the court views the record and draws all reasonable inferences in the light most favorable to the nonmoving party. *See Nawrot v. CPC Int'l*, 277 F.3d 896, 903 (7th Cir. 2002).

II. Background Facts[2]

Plaintiff, Carol J. Lockman-Gelston, began working for Defendant, Variable Annuity Life Insurance Company ("VALIC"), at its Indianapolis office in 1993, as a scheduling clerk. She has arthritis, tendonitis, and chronic eye muscle palsy. Because of her eye palsy, she wore an eye patch at times and had a disabled parking sticker. Defendant, American General Corporation, is a holding company and shareholder of VALIC.[3]

Sometime in 1993, Lockman-Gelston became the Indianapolis office's full-time receptionist. As the receptionist, she spent most of her time answering the phone and

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[2] These facts are not disputed unless otherwise noted and are viewed in the light most favorable to Plaintiff, the nonmoving party. Additional facts may be set forth in the Discussion section as necessary. The parties had many disputes about the factual submissions, but the undiscussed factual disputes are not even remotely material to the issues raised by the summary judgment motion.

[3] This fact is not established by the parties' summary judgment submissions as the submissions are silent as to American General Corporation's involvement in this case. However, the Case Management Plan ("CMP") asserts this fact, and the court accepts it as true for purposes of ruling on the pending motions, as it makes no difference to the outcome of those motions. Defendants indicated in the CMP that American General Corporation would seek dismissal, but it has not done so to date.

spent some time opening, sorting, and distributing incoming and preparing outgoing mail. She also assisted in performing the representative [sales representative] mail ("rep mail") duties twice a week. Her job duties included signing for UPS packages that were delivered. And, FedEx packages were delivered in front of her desk.

In 1996, Lockman-Gelston quit work for one week and then returned as a part-time scheduling clerk. Peg Boodt was the office's administration manager at the time. Boodt asked her if she would like to return to the receptionist job and indicated that someone else would perform the rep mail duties and UPS mail. When Lockman-Gelston returned to the job, she was again responsible for group filings, agent filings, and for distribution of regular mail around the office. She was able to distribute mail using a cart. Ken Young, who had been hired to assist Boodt, helped Lockman-Gelston do some of the lifting required to accomplish her duties.

In November 1998, VALIC announced a nationwide restructuring of operations. In this restructuring, the Customer Service Representative function in Indianapolis and in other VALIC offices were consolidated in Houston, where VALIC is headquartered. With the restructuring, certain positions were to be eliminated and the individuals holding such positions would have to re-apply for jobs with VALIC if they wished to remain employed. Lockman-Gelston's Receptionist position was to be revised and replaced with the Receptionist/Office Assistant position. She was told that she had to reapply for new available positions. Just prior to the restructuring, Tanika Unseld held the Secretary or Administrative Assistant position and was responsible for the rep mail duties assigned to that position. Also prior to the restructuring, Sarah Weiand held the

Sales Support Assistant position and was responsible for (1) handling the boxed packages received and/or sent via UPS, FedEx, and other carriers (including packages of supplies, brochures, marketing materials, and training materials); and (2) handling and distributing boxes of quarterly reports to VALIC's sales representatives. The positions held by Unseld and Weiand were not eliminated and were not to change as a result of the restructuring.

VALIC's policy was to fill its positions from within and before looking outside, whenever possible. VALIC's written job description for the new Receptionist/Office Assistant position described the job as follows: "Answer and route incoming calls, greet visitors, and provide routine administrative and clerical support to the Indianapolis regional office." (Bradley Dep., Ex. 10 at 1.) The job description also listed the education and other job requirements and identified the following as the duties of the Receptionist/Office Assistant position:

1. Answer, screen and route incoming calls to the office staff and/or agents. Respond to routine inquiries as appropriate.
2. Greet visitors and accept deliveries.
3. Open, sort and distribute incoming and prepare outgoing mail.
4. Utilize personal computer to process work, create correspondence/documents, and update databases as assigned.
5. Assist with production and distribution of reports, bulletins, and information.
6. Prepare accounts payable for approval and processing.
7. Order and maintain office supplies.
8. Establish filing system.
9. Maintain Desk Manual in approved format.

10. Perform other duties as assigned.

(*Id.* at 2.) The written description indicated that there were no undesirable working conditions on the job such as "prolonged standing, walking, bending, lifting, noise, etc." (*Id.* at 3.)

Lockman-Gelston applied for the Receptionist/Office Assistant position by posting an internal job application with VALIC's computer system on December 3, 1998. She met the job qualifications, and she had been meeting VALIC's expectations in terms of her job duties. After she had applied for the position, Bradley told her about the position's expanded job responsibilities. He told her the job responsibilities included: (1) the handling of boxed packages (including packages of supplies, brochures, marketing materials, and training materials) that were received and/or sent by VALIC via UPS, FedEx, and other carriers; (2) the handling of boxes of quarterly agent comp/servicing reports and distribution of those reports to VALIC's sales representatives; and (3) the "rep" mail duties (collectively the "Three Duties At Issue"). Bradley assigned these duties, for which Unseld and Weiand had previously been responsible, to the Receptionist/Office Assistant position despite the fact that Unseld's and Weiand's positions were not to change as a result of VALIC's restructuring.

Effective January 1, 1999, Bradley became Lockman-Gelston's supervisor. On many occasions they discussed the new requirements of the Receptionist/Office Assistant position, and Lockman-Gelston expressed concerns to Bradley that she could not physically handle the Three Duties At Issue, that is, she could not do the lifting and

bending that would be required of her in the new position. She also discussed these concerns with others, including Boodt. Lockman-Gelston asked Bradley, Boodt and Laura Gregory, then a VALIC Human Resources Representative, to help her do the Receptionist/Office Assistant job by reassigning the Three Duties At Issue to someone else or providing her assistance with the rep mail, and other job tasks that required bending, lifting and anything strenuous. Bradley refused to reassign these duties. He told Lockman-Gelston that when she had boxes she could not lift, if there were other people around, they could help her, but this would be the exception not the rule. With the restructuring there would be fewer people in the office available to assist her.

Lockman-Gelston pointed out to Bradley that VALIC's description of the Receptionist/Office Assistant's duties did not include the Three Duties At Issue and that the job description specifically excluded all undesirable working conditions such as prolonged standing, walking, lifting, or bending. In response, Bradley told her that he could add duties as he wished because the description stated that the Receptionist/Office Assistant must "perform other duties as assigned." He also told her in response to her concerns that she could try out the Three Duties At Issue to decide whether she would accept them. She agreed to try them out, but found she was physically incapable of performing them. Her physical difficulties in performing the Three Duties At Issue was obvious to coworkers, Ken Young and Sarah Weiand. Lockman-Gelston met with Bradley and told him that she was incapable of performing the Receptionist/Office Assistant job because of the lifting, bending and squatting.

Because it became apparent to Lockman-Gelston that neither Bradley, nor anyone else at VALIC, was going to reassign the Three Duties At Issue and because Lockman-Gelston wanted to work for VALIC, she expressed interest in the only other available position, the Administration Specialist position. VALIC's written job description for the position described the purpose of the job as "to handle the administrative activities associated with sales transactions in the regional office" and listed the following requirements: (1) high school graduate; (2) four years related office experience; (3) effective communication skills; (4) data entry skills; (5) basic knowledge of PC and various software; (6) an aptitude for math; (7) detail orientation; (8) problem-solving ability; and (9) ability to prioritize multiple tasks." (Pl.'s Dep., Ex. 5.) Bradley told Lockman-Gelston that she could not apply for the Administration Specialist position until she gave him a resume; he claimed the resume she had already given VALIC had been lost. She recreated her resume and applied for the Administration Specialist position on February 4, 1999, by posting an internal job application via VALIC's computer job posting program.

Since she was experiencing muscle and joint pain in her shoulders and neck, Lockman-Gelston was seen by her physician, LeeAnne M. Nazer, M.D, on February 8, 1999. Lockman-Gelston reported that she was having a hard time lifting, bending, and doing physical chores at home. Dr. Nazer performed a battery of tests on her, suggested that she limit her lifting, and wrote her a doctor's note indefinitely limiting her lifting to 20 pounds and to 10 boxes per day due to her tendonitis and arthritis.

On or about February 10, 1999, Lockman-Gelston brought Dr. Nazer's note limiting her lifting to Bradley. He requested that Lockman-Gelston decline or refuse the Receptionist/Office Assistant position in writing, and she refused to do so. Bradley told her that she would not get the position if she could not perform the duties of that position and that she would be terminated if she failed to obtain another position with VALIC.

On March 4, 1999, Lockman-Gelston briefly discussed the Administration Specialist position with Bradley and Boodt. They discussed the functions of the position, and Boodt told Lockman-Gelston she thought that she might not be right for the position because she was a people person. They asked her if she was interested in the Administration Specialist position, and she replied, "probably not really." (Pl.'s Dep. at 208.) Also on this occasion, Lockman-Gelston again brought up her desire for the Receptionist/Office Assistant position. Bradley and Boodt indicated that they were sorry they could not accommodate her with the lifting and bending. Lockman-Gelston told them that she would accept a VALIC severance package.

Lockman-Gelston was fifty-two years of age at the time she was not selected for the sought-after positions and her employment with VALIC was terminated. Prior to her termination, she was the oldest full-time clerical employee in VALIC's Indianapolis office. And, in late 1998 when the restructuring was announced, a majority of VALIC's employees in the Indianapolis office were under forty.

III. Discussion

Plaintiff sued Defendants alleging age and disability discrimination in violation of the ADEA and ADA and failure to accommodate under the ADA. Defendants moved for summary judgment.

A. ADEA Claim

There are two ways in which an employment discrimination plaintiff can avert summary judgment for the defendant. *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000); *Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 862-63 (7th Cir. 1997). The first is through direct evidence of discriminatory motivation of the defendant or its agents. *Radue*, 219 F.3d at 616; *Greenslade*, 112 F.3d at 862. Direct evidence is evidence which, "'if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.'" *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 454 (7th Cir. 1999) (quoting *Eiland v. Trinity Hosp.*, 150 F.3d 747, 751 (7th Cir. 1998) (citations omitted)). The second way is through the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Radue*, 219 F.3d at 616; *Greenslade*, 112 F.3d at 862. Plaintiff offers both direct and indirect evidence to establish her age discrimination claim.

Allegedly discriminatory remarks by an employer can be direct proof of discriminatory intent, *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1121 (7th Cir. 1998); but there must be some connection between the remark and the employment decision in

question. In other words, allegedly discriminatory remarks are relevant "only if they are both made by a decisionmaker and related to the employment decision at issue." *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 688 (7th Cir. 1998). "[A]ctions and comments by employees not involved in a discharge decision cannot provide a basis for charging other employees with discrimination." *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 397 (7th Cir. 1997). Plaintiff offers evidence of four alleged age discriminatory remarks made by VALIC or its agents: (1) the comment by VALIC's Regional Manager Bill Tubbs that Plaintiff acted "like [she] was 85 years old"; (2) his reference to her after her termination as "retired"; (3) the inquiry by Tanika Unseld, Tubbs's secretary, to Plaintiff whether "she would be happier in a company with employees closer to her own age"; and (4) the remark by Mark Burns, VALIC's Northern Area Manager, that she was a "wimp."

Defendants maintain that Tubbs played no part in determining who obtained the positions sought by Plaintiff. They offer the affidavit of Gary Bradley for support as well as Plaintiff's testimony that Tubbs never attended any of the meetings she had with Bradley and Boodt to discuss the Receptionist/Office Assistant position and she had no first hand knowledge that he played any part in selection for that job. Plaintiff's evidence that Tubbs hired and directly supervised Bradley, that Bradley was answerable to Tubbs, and Tubbs "controlled the entire Indianapolis regional office for VALIC, including hiring and firing decisions" (Ken Young Aff. ¶ 19), does not put this

factual issue into reasonable dispute.[4] Even assuming that Tubbs controlled hiring and firing decisions, there is a want of evidence that would connect his remarks to the employment decisions at issue in this case. As for Burns, Defendants offer the statements in both Bradley's affidavit and Burns's affidavit that Burns played no part and had no role in the decisions challenged by Plaintiff. Plaintiff offers no evidence to contradict this evidence, and admits these facts as asserted by Defendants. Defendants also offer the Bradley affidavit and Plaintiff's own testimony to establish that Unseld had no role and gave no input into the decisions at issue. Thus, the court concludes that Plaintiff's "direct evidence" fails to create a triable issue as to unlawful discrimination.

So, Plaintiff must rely on the *McDonnell Douglas* framework if she is to avert summary judgment. Under that framework, a plaintiff must first establish a prima facie case of age discrimination. *Nawrot v. CPC Int'l*, 277 F.3d 896, 905 (7th Cir. 2002); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000). Once the plaintiff demonstrates a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment decision in question. *Nawrot*, 277 F.3d at 905. If the defendant discharges this burden, then the burden shifts back to the plaintiff to show "either directly that a discriminatory reason more likely motivated the action or indirectly that the employer's articulated reason for

[4] This statement in Young's affidavit is conclusory and therefore insufficient to raise a genuine issue of material fact. *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 354 (7th Cir. 2002) ("It is well settled that conclusory allegations and self-serving affidavits, without support in the record, do not create a triable issue of fact.").

the employment action is unworthy of credence, but a mere pretext for intentional discrimination." *Id.* The burden of persuasion remains with the plaintiff at all times. *Id.*

Defendants on summary judgment have assumed that Plaintiff can make her prima facie case. They have offered legitimate, nondiscriminatory reasons for not selecting Plaintiff for the sought-after positions. Thus, the burden shifts back to Plaintiff to show pretext.

"Without direct evidence of pretext (e.g., an admission), a plaintiff may show pretext by presenting evidence 'tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the [decision] in question, or were insufficient to motivate the [decision].'" *Nawrot*, 277 F.3d at 906 (quoting *Testerman v. EDS Tech. Prods. Corp.*, 98 F.3d 297, 303 (7th Cir. 1996); *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1133 (7th Cir. 1994)). Evidence that the decision in question was "mistaken, ill considered or foolish," is insufficient to show pretext "so long as [the employer] honestly believed those reasons[.]" *Nawrot*, 277 F.3d at 906 (quoting *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000)); *see also O'Connor v. DePaul Univ.*, 123 F.3d 665, 671 (7th Cir. 1997) ("On the issue of pretext, our only concern is the honesty of the employer's explanation. . . ."). Courts "do not sit as a super-personnel department that reexamines an entity's business decision and reviews the propriety of the decision." *Nawrot*, 277 F.3d at 906.

1. Receptionist/Office Assistant Position

Defendants state that they did not hire Plaintiff for the Receptionist/Office Assistant position because she did not want it as she understood it to be structured. They offer the following testimony for support:

> Q. Do you remember meeting with Gary [Bradley] the next day, on January 27, to discuss the receptionist/office assistant position, and at that meeting telling Gary that you did not want to pursue the receptionist/office assistant position?
>
> A. Okay. I remember meeting with him, and I told him that due to the lifting and bending and squatting, I was incapable of doing that position, not that I didn't want it. I was incapable of doing that position.

(Pl.'s Dep. at 136.) Plaintiff also testified that she "asked [Bradley] what else I could do, what else can he do or do, and he more or less said I could apply for that other job." (*Id.*) Though one inference would be that Plaintiff did not want the Receptionist/Office Assistant position because she was incapable of performing some of the duties that came with the position, Plaintiff also testified that during a subsequent meeting with Bradley and Boodt she told them that she wanted the position.

Though Defendants argue that there is a want of evidence that Plaintiff's age played any role in the decision to assign the Three Duties At Issue to the Receptionist/Office Assistant position, Plaintiff is not required to show that her age played a role in *that* decision. Instead, at this stage, Plaintiff need only produce evidence that if believed by the trier of fact would create a genuine issue as to whether

Defendants' explanation for not *hiring* her for that position was unworthy of belief and a pretext for intentional discrimination. She has done so.

A trier of fact may infer the ultimate fact of discrimination from the falsity of the employer's explanation:

> rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (quotation omitted). "Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148.

Not only does Plaintiff offer evidence that refutes Defendants' claim that she did not want the position, but also, she offers other evidence from which a reasonable trier of fact could find that the Three Duties At Issue really were not, or were not supposed to be, part of the new Receptionist/Office Assistance position: they were not expressly enumerated responsibilities in the written job description; a reasonable interpretation of the description of the duty "[o]pen, sort and distribute incoming and prepare outgoing mail" would not include the boxes and large shipments; and, this is especially true because the written job description indicated there was no prolonged bending or lifting, whereas, the evidence is that performance of the Three Duties At Issue would involve such activity. In addition, Defendants assert in their Statement of Material Fact ("SMF")

Number 64 that Lockman-Gelston would have difficulty doing the Receptionist/Office Assistant job because packaging and distributing rep mail twice a week is difficult for her to do since it requires prolonged standing which hurts her feet. This seems to suggest that prolonged standing would be required of the rep mail duties; yet, the written job description expressly excludes prolonged standing. Also, a reasonable trier of fact could infer that the Three Duties At Issue were added after Plaintiff applied for the position in order to prevent her from being able to obtain that position: a trier of fact could reasonably find that the duties were not part of the written job description, the record supports a finding that Bradley was aware that Plaintiff could not perform the "rep" mail duties, yet reassigned them to the position; and there is evidence that Bradley reassigned the Three Duties At Issue from the job duties of the Administrative Assistant and Sales Support Assistant positions even though those positions were not changed during the restructuring, and the individuals who held those positions eventually quit because they didn't have enough to do. Further, there is some evidence that Bradley has been less than consistent in explaining the reassignment of the Three Duties At Issue–once saying they fell under the "perform other duties as assigned" and at another time claiming they fell under "[a]ssist with production and distribution of reports, bulletins, and information" and "open, sort and distribute incoming and prepare outgoing mail."

Plaintiff's prima facie case (which the court assumes she can establish as it was not challenged by Defendants), combined with evidence sufficient to reject Defendants' stated reason for not hiring her for the Receptionist/Office Assistant position and the

other record evidence discussed above, permit a reasonable inference that Defendants unlawfully discriminated against her on the basis of her age. Therefore, the summary judgment motion should be denied with respect to the age discrimination claim premised on the failure to hire Plaintiff for the Receptionist/Office Assistant position.[5]

This conclusion should not be construed as ringing endorsement of the strength of this age discrimination claim. Plaintiff still faces the difficult hurdle of persuading a jury that age was the reason she was not hired for this position. A much more plausible explanation might be that Plaintiff's disability (or perceived disability) was the reason she was not hired. It may be difficult for a jury to understand how age has anything to do with the decision to hire her. This claim has survived summary judgment because of an inference that *may* be drawn–that is not to say that it is likely that the inference will be drawn by the trier of fact.

2. Administration Specialist Position

Defendants offer evidence that they did not hire Plaintiff for the Administration Specialist position because when asked by Bradley whether she was interested in the

[5] The lack of evidence that Bradley or Boodt said anything to Plaintiff to make her believe they were discriminating against her because of her age does not render Plaintiff unable to prove pretext on the record before the court. (The absence of such evidence, however, might make it harder for her to persuade a trier of fact that she was discriminated against because of her age.) The remarks by Tubbs, Burns and Unseld about Plaintiff's age, as explained, are not suggestive that age played any role in the decision not to hire Plaintiff for the Receptionist/Office Assistant position. And, the court does not rely on Weiand's testimony that Bradley "rolled his eyes" when discussing Plaintiff or that she believed Bradley assigned the duties to the position so Plaintiff would leave VALIC's employment. Without more, this testimony is conjecture.

position, she responded, “probably not really,” (Pl.’s Dep. at 208), which he understood to be a negative response. Defendants contend that if Bradley was mistaken in his belief that Plaintiff did not want the position, his mistake is not evidence of pretext.

Plaintiff contends that the following establishes that the Defendants’ stated reason is a pretext for age discrimination: (1) she asked Bradley whether she could apply for the position, thus indicating her desire for that position; (2) Bradley required her to submit a resume which he claimed had been lost even though she had been working for VALIC for almost six years, thus making it unnecessarily difficult for her to apply for the position; (3) she recreated her resume and applied for the position on February 4, 1999, further indicating her desire for the position; (4) Bradley and VALIC ran an advertisement for the position in the local paper on February 7 before even speaking with Plaintiff about the position, despite VALIC’s policy to fill the position from within; (5) VALIC interviewed Charina Harris for the position on March 3; (6) the next day, on March 4, Plaintiff accepted a call from Harris who wanted directions for a lab for a drug screening because she had been selected for the position; (7) and it was not until later that same day that Plaintiff told Bradley and Boodt that she was “probably not really” interested in the position; (8) Plaintiff said this because she knew they had already filled the position, and Boodt had indicated that she thought Plaintiff might not be right for the position; (9) she was never offered the position; and (10) VALIC did not indicate on her application that she had withdrawn her candidacy for the position although there was a space on the application to do so. None of this creates a triable

issue of pretext as to the reason Defendants offer for not hiring Plaintiff for the Administration Specialist position.

That Plaintiff initially expressed a desire and interest in the position by making inquiry and later applying for the position is simply insufficient to show that Bradley and Boodt did not honestly believe her when she subsequently indicated that she was "probably not really" interested in the position. Job applicants can, and often do, change their minds about whether they really want a position after they have applied for the position. That Bradley required Plaintiff to submit a resume even though she had been employed at VALIC for several years is no evidence of pretext. There is nothing suspicious about requiring a resume with a job application. Plaintiff's self-serving impression that Bradley made it unnecessarily difficult for her to apply for the position is conclusory and unsupported, and Plaintiff offers no evidence to raise a reasonable inference that her resume was not legitimately required as part of the application process. The undisputed evidence is that Plaintiff did not have a resume in her file and Bradley had not supervised her before. (Bradley Suppl. Aff. ¶ 19.)

VALIC's failure to indicate on Plaintiff's application that she had withdrawn her candidacy is insufficient to raise a genuine issue of pretext. Similarly, VALIC's failure to strictly follow its policy of attempting to fill positions from within before looking outside and placing an ad in the paper for the position may be insufficient to raise a genuine issue of pretext. *See Dugan v. Albemarle County Sch. Bd.*, 148 F. Supp. 2d 688, 696 (W.D. Va. 2001) (concluding that evidence that principal violated school corporation's own established policy was insufficient to show that the employment decision was

based on an unlawful motive under Title VII or the ADEA). Moreover, these things are inconsequential given the undisputed fact that Plaintiff told Bradley when later asked, that she was "probably not really" interested in the position.

To establish that Harris was hired before Plaintiff said that she was not really interested in the position, Plaintiff relies solely on hearsay evidence, which is inadmissible and, therefore, fails to raise a genuine issue of pretext.[6] *See*, *e.g.*, *Minor v. Ivy Tech State College*, 174 F.3d 855, 856 (7th Cir. 1999); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) Thus, the evidence that Harris was hired by VALIC on March 29, 1999, is unrefuted.[7] Plaintiff's affidavit statement that she indicated she was not really interested because she knew the position had already been filled is inadmissible for lack of foundation as the only foundation offered is hearsay evidence. Further, Plaintiff's self-serving explanation why she said she was not interested in the position has no bearing on whether Bradley and Boodt honestly believed Plaintiff when she told them she was not really interested in the position. Plaintiff's motivation for

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[6] Had Plaintiff offered admissible evidence to show that Harris had been hired before Plaintiff told Bradley and Boodt that she was "probably not really" interested in the position, chances are good that she would have created a triable issue on pretext.

[7] This fact is asserted in SMF 102 and substantiated by paragraph 10 of the affidavit of Laura Gregory, a VALIC Human Resources Representative at the relevant time. Defendants also assert this fact in their Statement of Additional Evidence On Reply ("SAE") 264 and attempt to substantiate this fact with paragraph 10 of Bradley's Supplemental Affidavit. Plaintiff moved to strike the assertion in the SAE, contending Bradley had no personal knowledge of the matter. Even if Bradley had no personal knowledge of the matter, Gregory's affidavit establishes that she did, and Plaintiff does not argue otherwise. Plaintiff attempts to refute Gregory's statement with hearsay evidence, which is inadmissible and cannot raise a genuine issue of fact. *See*, *e.g.*, *Minor*, 174 F.3d at 856.

indicating to the decisionmakers that she was no longer interested is simply not material, particularly where there is no evidence that she told them her alleged reasons for losing interest in the position. Given that Plaintiff advised Bradley and Boodt that she was "probably not really" interested in the position, the fact that she was never offered the position is neither surprising nor evidence of pretext. And, if Bradley erred in his understanding based on Plaintiff's own expressed lack of interest that she did not want the position, his mistake is insufficient evidence of pretext. *See*, *e.g.*, *Nawrot v. CPC Int'l*, 277 F.3d 896, 906 (7th Cir. 2002).

The court concludes that Plaintiff has not come forward with sufficient evidence to raise a genuine issue as to whether a discriminatory reason more likely motivated the decision not to hire her for the Administration Specialist position or whether Defendants' explanation that she was not selected because she said she did not want the position was a pretext for age discrimination. Therefore, Defendants are entitled to summary judgment on Plaintiff's age discrimination claim premised on the failure to hire Plaintiff for the Administration Specialist position.

B. ADA Claims

Plaintiff alleges that Defendants violated the ADA by not making reasonable accommodations for her, and terminating and failing to hire her because of her disability. The ADA prohibits discrimination against a "qualified individual with a disability" with regard to, among other things, hiring and discharge. 42 U.S.C. § 12112(a). "Discrimination" under the ADA also includes the failure to make "reasonable

accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee[.]" 42 U.S.C. § 12112(b)(5)(A). In order to prevail at trial on her claims under the ADA, Plaintiff must be able to show that she is a "qualified individual with a disability." 42 U.S.C. § 12112; *see also Nawrot v. CPC Int'l*, 277 F.3d 896, 903 (7th Cir. 2002). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *see also Nawrot*, 277 F.3d at 903. An individual has a "disability" as defined by the ADA if she (1) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102(2); *see also Nawrot*, 277 F.3d at 903.

Defendants contend that Plaintiff cannot prove she has a "disability" as defined by the ADA because she cannot prove an actual impairment under prong (1), and she has not alleged in her Complaint that she satisfies the definition under any of the other two prongs. Plaintiff responds that by alleging that she was "disabled," she sufficiently alleged that she has an actual impairment (prong (1)) and was regarded as having such an impairment (prong (3)). She maintains that she can establish both of these prongs.

Plaintiff alleges that she suffers from arthritis and tendonitis and that these conditions make lifting, bending, twisting, and squatting difficult. She also alleges that she suffers from "chronic eye muscle palsy," which requires her to wear a patch on her eye at times. Defendants contend that the only major life activity on which Plaintiff may

rely to show she is disabled is the major life activity of working, citing *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995), but *Dutcher* recognizes that there are major life activities other than work, including lifting. *Id.* at 726 n.7. And, the court is well aware that "whether a person has a disability under the ADA is an individualized inquiry". *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999). Plaintiff does not claim that she is substantially limited in her ability to work.

Rather, she claims she is substantially limited in the major life activities of lifting, bending, twisting, and squatting. Courts have considered lifting to be a major life activity. *See*, *e.g.*, *Marinelli v. City of Erie, Pa.*, 216 F.3d 354, 363 (3rd Cir. 2000); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1172-74 (10th Cir. 1996) (holding that lifting is a "major life activity" and that individual with multiple sclerosis who could not lift items over fifteen pounds and only could lift items less than that occasionally raised genuine issue of fact as to disability). In addition, the Interpretive Guidance to Title I of the ADA, states that "major life activities include, but are not limited to, sitting, standing, lifting, reaching." 29 C.F.R. Pt. 1630, App. §1630.2(i). *Contreras v. Suncast Corp.*, 237 F.3d 756, 763 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 62 (2001), which addressed whether an individual was substantially limited in the major life activity of working because he was unable to lift more than 45 pounds for an extended time, is inapposite. Defendants argue, without citing any supporting authority, that lifting "should be subordinate to the major life activity of working." (Reply Br. at 14-15.) Why this should be so is not apparent to this court. Nor was it apparent to the *Marinelli* court, the *Lowe* court, or the EEOC.

Defendants also contend that based on Plaintiff's own admissions, she is not disabled. The Supreme Court said in *Sutton v. United Air Lines, Inc.*, that "disability under the Act is to be determined with reference to corrective measures[.]" 527 U.S. 471, 488 (1999). "In other words, . . . courts may consider only the limitations of an individual that persist after taking into account mitigation measures (e.g., medication) and the negative side effects of the measures used to mitigate the impairment." *Nawrot*, 277 F.3d at 904 (citing *Sutton*, 527 U.S. at 482-83; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999)). Defendants argue that Plaintiff has admitted that when she takes her medication, her tendonitis does not prevent her from engaging in any life activity and her eye muscle palsy does not prevent her from going to work. But this leaves unanswered the question of whether medication has the same ameliorating effect on Plaintiff's arthritis. Defendants also assert that when asked during her deposition if she could think of things that she would like to do but was unable to do because of her impairments, she responded that she was "not sure right now." (Pl. Dep. at 186-88.) That Plaintiff was unable to think of things she'd like to do but could not because of her impairments, does not compel a finding that she is not "disabled" as defined under the ADA. Nothing in the statutory definition hinges on an individual's desire to perform some activity, and Defendants cite no authority to support their implication that the disability determination turns on such a factor.

Given the record and Defendants' arguments as to why Plaintiff cannot prove that she has an impairment that substantially limits her in one of her major life activities, the court concludes that Defendants have not established the absence of a genuine

issue of material fact regarding whether Plaintiff has a disability under the ADA. As there are genuine issues of fact as to whether Plaintiff satisfies the first prong of the definition of "disability," the court need not consider whether she also satisfies the third prong of the definition.

Defendants imply that Plaintiff cannot prove that she is a qualified individual with regard to the Receptionist/Office Assistant position because she asked that the lifting tasks of the job be assigned to other employees. Defendants argue that given the reduced staff in the Indianapolis office, it would be unreasonable to expect VALIC to separate these tasks from the job. The ADA does not require an employer to change the essential functions of a job as a form of accommodation. *See*, *e.g.*, *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 913 (7th Cir. 1996) ("In short, reasonable accommodation does not encompass reallocation of essential job functions.").

The record, however, at the least raises a genuine issue of material fact as to whether the lifting tasks were an essential function of the Receptionist/Office Assistant position. Defendants do not directly argue or point to evidence to establish that the lifting tasks were an essential function of the job. And, they have offered no evidence to establish that reassigning the lifting tasks would have been unreasonable or would have imposed an undue hardship on VALIC. *See* 42 U.S.C. § 12112(b)(5)(A). Merely arguing that it would be unreasonable is insufficient without some evidentiary material to back up that argument. Thus, the court finds genuine issues of material fact preclude summary judgment on Plaintiff's failure to accommodate claim.

With respect to Plaintiff's ADA discrimination claim, Defendants argue only that Plaintiff cannot establish that she had a disability as that term is defined under the Act. They did not advance any arguments regarding whether Plaintiff, assuming she had a disability, could prove that she was discriminated against because of that disability. Had they done so with respect to the Receptionist/Office Assistant position, their arguments would fail to win them summary judgment on the ADA claim for the same reasons they fail on the ADEA claim. Applying the *McDonnell Douglas* framework, which is applicable, *see Nawrot v. CPC Int'l*, 277 F.3d 896, 905-06 (7th Cir. 2002), Defendants have not challenged whether Plaintiff can demonstrate a prima facie case, they offered a legitimate, nondiscriminatory reason for not hiring her, but Plaintiff has offered evidence that calls the honesty of their reason into doubt, and allows a trier of fact to conclude that Defendants unlawfully discriminated against her–whether based on her alleged disability, her age, or both is up to the trier of fact to determine.

However, with respect to the Administration Specialist position that Plaintiff's failure to hire claim under the ADA is doomed for the same reasons as her claim under the ADEA. Defendants have articulated a legitimate, nondiscriminatory reason for not hiring Plaintiff for the position of Administration Specialist–she said she did not really want it–and Plaintiff has come forward with insufficient evidence to create a triable issue as to whether Defendants were more likely motivated by unlawful discrimination or that the reason was unworthy of belief. Though Defendants did not directly apply its arguments and evidence regarding the Administration Specialist position to the ADA claim, the record before the court convincingly establishes that had they done so, her

ADA claim could not survive summary judgment. Trying the ADA discrimination claim based on the failure to select Plaintiff for the Administration Specialist position would be a needless waste of everyone's time and energy. No reasonable jury could find in her favor on this claim. Therefore, the court finds that summary judgment should be granted Defendants on the ADA discrimination claim based on the failure to hire Plaintiff for the Administration Specialist position.

IV. Motions to Strike

Plaintiff objected to and moved to strike various assertions in Defendant's Responses to her Statement of Additional Material Facts and in Defendant's SAEs. With the exception of the assertion in SAE 264, none of the other assertions are material to the matters that need to be resolved on summary judgment. The court has disregarded the other assertions to which Plaintiff objected; the motion to strike was unnecessary. Therefore, Plaintiff's motion to strike is DENIED.

Defendants moved to strike selected paragraphs of Plaintiff's Response to Defendants' Statement of Material Facts ("RSMF") and Plaintiff's Statement of Additional Material Facts ("SAMF"). Defendants objected to those RSMF that Plaintiff admitted but her response contained additional factual propositions. This objection is well-taken, *Pike v. Caldera*, 188 F.R.D. 519, 526 (S.D. Ind. 1999). Where Plaintiff's RSMF admitted a SMF, the court has disregarded the elaboration in Plaintiff's responses.

Defendants also object to numerous RSMFs that contained argument. For the most part, the RSMFs that contain argument relate to immaterial or inconsequential matters. Addressing each and every RSMF is not necessary and would be unduly time consuming and unfair to the other litigants with cases before the court. In this case the court recognizes the argument for what it is and considers it as argument rather than assertions of fact.

Defendants object to SAMF 216 on the ground that it contains more than one factual assertion. It does; however, the court will overlook this lack of compliance with L.R. 56.1(f). Defendants themselves at times have not complied with this portion of the rule, and it would be unfair to enforce it against one party but not the other.

Defendants argue that SAMFs 181, 195, 199, and 218 contain statements about which the affiants have no personal knowledge. They are correct that Sarah Weiand's affidavit does not show sufficient personal knowledge as to why Bradley decided to assign certain duties to the Receptionist/Office Assistant position. And, her belief about why he did so is immaterial. Similarly, that Weiand took Bradley's rolling of his eyes to mean he was irritated by Plaintiff's concerns is likewise immaterial. It also is a conclusory assertion. Defendants are also correct that Plaintiff lacks personal knowledge to testify that Bradley made it unnecessarily difficult for her to apply for the Administration Specialist position. (She also asserted this fact in paragraph 46 of her affidavit.) Paragraph 1 of her affidavit does not change this reality. Nor does it change the fact that she has not shown personal knowledge to testify that Bradley requested a temporary worker to interview for the position. (She also asserted this in paragraph 48

of her affidavit.) None of this matters at this point anyway, given the ruling on the summary judgment motion.

Defendants correctly argue that the statements in SAMFs 192, 193 and 204 contain inadmissible hearsay. The hearsay is disregarded and cannot raise a genuine issue of material fact. *See*, *e.g.*, *Minor v. Ivy Tech State College*, 174 F.3d 855, 856 (7th Cir. 1999); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997).

Defendants object to Plaintiff's responses to SMFs 24, 62, 65 and 81 on the ground they contain statements that contradict Plaintiff's previous testimony. SMF 24 is immaterial. Plaintiff testified that her tendonitis was "fine" when she was on medication, so to that extent her response to SMF 62 contains a contradictory statement, it fails to raise a genuine issue of fact. *See Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1055 (7th Cir. 2000) (stating the general rule that a party cannot "create an issue of fact by submitting an affidavit whose conclusions contradict prior deposition or other sworn testimony.") (quotation omitted). The assertions in SMF 65 and 81 are not material and are simply disregarded.

Defendants are correct that Sarah Weiand has shown no personal knowledge to testify as to the duties of the Receptionist position, what the duties were before the restructuring are immaterial in any event. Her affidavit does show personal knowledge that Bradley planned to require the Receptionist/Office Assistant position to take over the lifting duties: he told her he was changing the position. Defendant's objection to paragraph 9 of Weiand's affidavit regarding what she took Bradley's rolling of his eyes

to mean and her belief as to why he reassigned the lifting duties are well-taken, and Weiand's beliefs in this regard are immaterial.

Defendants object to paragraphs 9, 10, 12, 13, and 19 of Ken Young's affidavit on the grounds that he lacks personal knowledge as to the matters asserted therein. The assertions in 9 and 10 are immaterial; the assertions in 12 and 19 are conclusory; and Young shows no basis for the assertion in paragraph 13. The court therefore disregards these portions of the Young affidavit. The assertion by Young in paragraph 16 adds little to Plaintiff's case. Even without Young's statement, the record already establishes that Bradley advised Plaintiff she would be responsible for the Three Duties At Issue if she took the position of Receptionist/Office Assistant.

Defendants object to paragraphs 10, 14, 20-22, 46, 48, 49, 53, 55, and 60 of Plaintiff's affidavit, contending she lacks personal knowledge of the matters asserted therein. The objection to paragraph 10 is overruled; Defendants admitted the assertion in their Response to Plaintiff's SAMF 115.[8] The objections to paragraphs 14 and 20-22 do not matter as Defendants concede that Bradley reassigned the Three Duties At Issue from the positions held by Unseld and Weiand to the new Receptionist/Office Assistant position. The objection to 46 is well-taken, for the reasons stated previously. Defendants are right that Plaintiff cannot testify that she made it clear to Bradley and Boodt that she wanted the Receptionist/Office Assistant position. Only they can testify about what was clear to them. However, the record does establish that Plaintiff told

[8] Objecting to the evidentiary basis when the fact asserted has been admitted is a silly waste of time.

them she wanted the position. Though Plaintiff can testify as to why she accepted the severance package, she has not demonstrated any personal knowledge about the interviewing and hiring of other candidates for the position of Receptionist/Office Assistant. She has not demonstrated personal knowledge of the matter asserted in paragraph 55, but even if Tubbs referred to Plaintiff as "retired," it makes no difference as it was a stray remark made by a nondecisionmaker. Finally, Plaintiff has not shown personal knowledge to testify about the official hire dates of any other VALIC employees.

The Defendants' motion to strike is GRANTED IN PART and DENIED IN PART, consistent with the reasons stated above.

V. Conclusion

For the foregoing reasons, Plaintiff's motion to strike is DENIED, Defendants' motion to strike is GRANTED IN PART and DENIED IN PART, and Defendants' motion for summary judgment will be GRANTED IN PART and DENIED IN PART. The failure to hire claims under the ADEA and ADA arising out of the failure to hire Plaintiff for the Receptionist/Office Assistant position as well as the failure to accommodate claim under the ADA remain for trial.

As claims remain for disposition, judgment will not be entered at this time. A separate order will set this case for a telephonic conference for purposes of selecting a trial date.

ALL OF WHICH IS ORDERED this 29th day of March 2002.

John Daniel Tinder, Judge
United States District Court

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